

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PTN UNDER CHRISTIAN MARRIAGE ACT. No 4 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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SILVANCE FRANKLIN BARIA

Versus

ELIZABETH DAVID HENDRY

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Appearance:

MS JAYSHREE C BHATT for Petitioner

MS SD RAMI for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 11/05/99

ORAL JUDGEMENT

1. This is a petition u/S. 10 of the Indian Divorce Act, 1869 moved by the petitioner - husband against the respondent no. 1 - wife, joining the respondent no. 2 as alleged adulterer. Short facts on the basis of which this petition has been moved may briefly be noted :-

2. The marriage of the petitioner and the 1st

respondent was solemnized according to the Christian law on 4/11/1995. There is no child out of the said marriage. The parties could not live together for more than a year and in October/November 1996 their relations got strained with the result that they were required to live separately from each other. It is the petitioner's case that thereafter on or around 2/11/1998 the respondent no. 1 got married with respondent no. 2 and on account of that occasion it is further the case of the petitioner that the respondent no. 1 is guilty of adultery.

3. The petitioner has, therefore, prayed for obtaining decree of dissolution of his marriage with the respondent no. 1 solemnized on 4/11/1995.

4. The matter was placed for further proceedings before this Court on 29/4/1999 when the parties were called in the chamber. After communicating with the parties, following order was required to be passed and the same appears at Exh. 8 in the record of this petition:-

"1. Today the opponent no. 1 filed her written statement. The same is taken on record. In so far as opponent no. 2 is concerned, learned advocate Ms. S.D. Rami states that she would appear for him also and file appropriate pursis adopting written statement of opponent no. 1. Hence, the matter is placed for framing issues on 3/5/1999.

2. When the parties have been called in the chamber for knowing their present status, the opponent no. 1 - Elizabeth David Hendry stated before this Court that she had entered into customary divorce as per divorce deed dated 4/6/1998. The petitioner also stated before this Court that such divorce deed was entered into between the petitioner and the opponent no. 1. Opponent no. 1 Elizabeth David Hendry has further stated before this Court that she has married opponent no. 2 - Sanjay Alick Stephen, who is also present before the Court. He also states before this Court that he has married opponent no. 1. Such marriage has been solemnized in the presence of John T. Christian, Registrar of Marriage. Both the opponents jointly submit that they do not want to adduce any evidence even after issues are framed.

3. Under the aforesaid circumstances, this Court

could not suggest any possibility of reconciliation of the petitioner and the opponent no.1.

4. There does not appear to be any collusion between the parties.

The matter is now kept for framing of issues and recording of evidence of petitioner on 3/5/1999."

5. The written statement of respondent no. 1 appearing at Exh. 8A discloses no other facts except those which have been recorded in the aforesaid order. The only stand of the 1st respondent is that since she got married with the 2nd respondent on account of a divorce deed between the petitioner and the respondent no.1, it could not be said that she had been living in adultery and hence, no decree for divorce could be passed in favour of the petitioner.

6. Following issues were framed on 3/5/1999 :-

I. Is it proved that the marriage between the petitioner and respondent no. 1 was solemnized at Ahmedabad on 4th November, 1995 as per the custom of the caste and as per the christian Form of Marriage as alleged ?

II. Is it proved that the relations between the petitioner and respondent no. 1 strained in October/November, 1996 and they started living separately as alleged ?

III. Is it proved that on 2nd November, 1998, the first respondent and the second respondent got married with each other as alleged and that since then, the respondent no. 1 herein has been guilty of adultery ?

IV. Is there any other legal impediment in granting prayer for decree of dissolution of marriage between the petitioner and respondent no. 1 as solemnized on 4th November, 1995 by a decree of divorce nisi ?

V. What order and decree ?

7. My findings to the aforesaid issues are as under:-

- I. In the affirmative
- II. In the affirmative
- III. Part-I affirmative  
Part-II as stated below
- IV. In the negative
- V. As per final order below.

#### R E A S O N S

8. The evidence placed on record may first be noticed. In support of the fact that petitioner and respondent no. 1 got married according to the Christian Form of Marriage on 4/11/1995 the parties have adduced their oral evidence as well as they have placed on record true copy of the marriage certificate at Exh. 12. In support of the fact that there were differences between the petitioner and the respondent no. 1 both of them have testified to such facts coupled with the fact that they started living separately from each other from around October/November 1996. In support of the fact that there was a proceeding undertaken by the respondent no. 1 - wife u/S. 498A of the Indian Penal Code, there is the admission of the petitioner in his cross-examination and evidence given by the respondent no. 1 in her oral testimony. The petitioner's mother was also joined in such proceedings which was undertaken on or around 7/10/1997. The petitioner has admitted in his cross-examination as well as before this Court as per the order reproduced hereinabove that there was a settlement between the petitioner and respondent no. 1, as a result of which they were advised by their respective learned advocates in the aforesaid criminal proceedings to enter into divorce by mutual consent as per the custom of their caste. The petitioner has, however, denied the suggestion that he made the 1st respondent to believe that the consent divorce was legal and valid; whereas the 1st respondent has testified to the fact that she was made to believe not only by the petitioner, but by the respective learned advocates that such a customary divorce by consent was permissible. True copy of the divorce deed is at Exh. 13. It has finally not been in dispute that the respondent no. 1 married with respondent no. 2. This has been evinced by the true copy of certificate of marriage Exh.6, which shows that both the respondents entered into marriage on 2/11/1998 and the Registrar of Marriage under the Christian Marriage Act has issued certificate in that respect. This is in short the evidence which broadly support the fact set out hereinabove by the petitioner and respondent wife. In the background of the aforesaid fact, first question that has to be answered would be

whether there is a collusion between the parties in bringing about these proceedings or whether there is collusion between the parties in seeing that a decree of dissolution of marriage between the petitioner and respondent no. 1 solemnized on 4/11/1995 is procured from this Court by collusion. At the outset, it might be noted that the parties were questioned by this Court in the chamber and this will be visualized from the order which has been reproduced in the opening part of this judgment. There is a marked difference between collusion and statement of true facts by the parties jointly at one or the other stage. There is a clear line of distinction between the two situations and there can be no anomaly in that respect. If true facts are stated by the parties, may be jointly, may be at different stage of the proceedings or in their evidence, there cannot be any collusion. Collusion would necessary imply either statements of facts which are not true to the knowledge of the parties or omission of statement of true and relevant facts before the Court with a view to leading the Court in passing a decree of divorce as per the relevant provisions contained in the Indian Divorce Act. The facts which are noted hereinabove would clearly indicate that this is a case where it cannot be said by any stretch of imagination that there has been a collusion between the parties. As a matter of fact, by way of peculiar development of circumstances from time to time a cloud appears to have shadowed the status of the parties, more particularly respondent no. 1 - wife for no fault on her part. Hence, in the facts of the case, there can be no doubt about the fact that there is no collusion between the parties.

9. It is clear that neither the petitioner nor the respondeat no. 1 can be said to be taking advantage of any wrong on the part of the either of the parties. As a matter of fact, they were under a grossly erroneous legal advice from the respective advocates in entering into divorce by mutual consent or customary divorce by mutual consent as per the aforesaid deed of divorce of marriage. They clearly appeared to have been wrongly advised by their learned advocates, who have more particularly not cared even to look at the provisions of the Indian Christian Marriage Act and Indian Divorce Act. In order that appropriate action might be thought of or might be initiated, it would be appropriate to send a copy of this judgment to the State Bar Council. Issue no. IV is answered accordingly in the negative.

10. As stated above, from the evidence which has been placed on record it is clear that the marriage of the

petitioner with respondent no. 1 was solemnized according to Christian Form of marriage on 4/11/1995. They started residing separately from around October/November 1996. Then there was an occasion for the 1st respondent to file a complaint u/S. 498A of the Indian Penal Code against the petitioner and his mother on or around 7/10/1997. As stated above, there was a settlement between the parties, namely petitioner and respondent no. 1 and they entered into the divorce deed dated 4/6/1998. It is here that a question would arise as to whether such a divorce would be legal and valid.

11. It is possible that before getting converted to Christianity the petitioner might be belonging to Baria caste which is stated to be Kshatriya caste. In fact there was no custom according to which the petitioner could have entered into a customary divorce by consent as evinced by the divorce deed in question. Section 3 of the Indian Christian Marriage Act, 1872 defines the expression 'Indian Christian' as including the Christian descendant of native of India converted to Christianity as well as such converts. Section 60 deals with conditions under which marriage of Indian Christian might be solemnized. One of the conditions is that neither of the persons intending to be married shall have a wife or husband still living. The Indian Divorce Act, which is applicable as the personal law for the purpose of dissolution of the marriage between the petitioner and respondent no. 1 does not provide as a ground for divorce either separation between the parties as per the facts hereinabove stated or divorce by consent of the parties. Under such circumstances, the divorce deed entered into between the petitioner and the respondent no. 1 will not result into lawful dissolution of the marriage between the two. At this very stage it might be noticed that respondent no. 1 cannot be said to be at fault in any manner since she had filed a complaint u/S. 498A of the Indian Penal Code against the petitioner and his mother and ultimately the parties, namely the petitioner and respondent no. 1 arrived at a settlement to get separated, but ill-advised as they were (as stated above) they entered into divorce by consent as per the deed of divorce Exh.13. To reiterate respondent no. 1 wife cannot be said to be at fault. She has in terms in her oral testimony expressed before this Court how she was misled in the matter of the deed of dissolution of marriage between the petitioner and respondent no.1. This has unfortunately resulted in respondent no. 1 marrying with respondent no. 2, which marriage has also become doubtful of legal recognition. Under such circumstances, inspite of her counter, she has to request

this Court for granting the prayer of dissolution of marriage so that she may go in for regularization of her marital relation with respondent no. 2 at an appropriate point of time. It might therefore, be seen that respondent no. 1 cannot be said to be at fault for what transpired in the proceedings u/S. 498A of the Indian Penal Code.

12. It is in the aforesaid background that the prayer for dissolution of marriage between the petitioner and the respondent no. 1 on the ground of adultery as contemplated by section 10 of the Indian Divorce Act shall have to be considered. Section 10 reads as under :-

"10. When husband may petition for dissolution.-

Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution.

Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman."

The words 'guilty of adultery' would assume importance. It is not in dispute that as a result of the divorce deed in question, respondents nos. 1 and 2 have entered into marriage and this fact is supported by the true copy of certificate of marriage Exh.16. It would, therefore, follow from the said fact that the respondent nos. 1 and 2 have been living as wife and husband, although such marriage might not be legally recognizable. As stated above, respondent no. 1 bonafide believed that her marriage with the petitioner came to be dissolved as per the divorce deed Exh. 13. For that matter on account of the ill-advice from the advocates, who might have appeared for the petitioner and the respondent no. 1 in the aforesaid proceedings u/S. 498 A of the Indian Penal Code, the parties entered into the divorce deed as aforesaid. Even the petitioner did not bother about consequences of the aforesaid divorce deed. It appears from his evidence also that he was alarmed by a priest refusing to recognize the petitioner having been legally divorced from the 1st respondent. This can be seen from

his oral testimony. He has deposed before this Court that in the midst of November 1998 he visited his Church where he has his membership, namely Church of North India located in Maninagar (E). Rev. Julius Christian, Press - Byter in charge of the Church informed him that a decree of divorce shall have to be obtained from the High Court if he wanted to marry. When he had shown the copy of the divorce deed Exh. 13 to him, he was informed that he would not permit him to marry on the strength of the said divorce deed. It is under such circumstances that he was required to file the present petition. Even then the 1st respondent cannot be faulted. While dealing with the words 'guilty of adultery' the peculiar facts and circumstances shall have to be borne in mind. The word 'guilt' and the word 'adultery' have to be treated as used in their broadest sense in the aforesaid provision in as much as there is no limitation upon such words to be found any where in the Indian Divorce Act. Such guilt therefore, might be intentional or even unintentional. The marital relation from the marriage between the two respondents as aforesaid might be described as adultery, but not in any strict sense of the term 'adultery'. The word 'adultery' can also take within its sweep unintentional consummation between a man and a woman. Thus, as there can be a 'technical' offence, there can also be a 'technical' guilt and there can as well be 'technical' adultery. If the words 'guilty of adultery' are construed broadly in the sense that they would also take within its sweep technical guilt of adultery as illustrated by the facts and circumstances of this case, it would be clear that the provision of sec. 10 of the Indian Divorce Act would stand satisfied in the present case. It would be more so if the status of the 1st respondent is taken into consideration with seriousness. If her status has gone into cloud for no fault on her part, unless the prayer in this petition is granted, it will not be possible for her to have that status brought to a regular shape. It is clear that the petitioner also cannot marry again if prayer in this petition is not granted.

13. Respondent no. 1 cannot be faulted. Even otherwise while adultery has been made offence u/S. 497 of the Indian Penal Code, the said provision does not envisage prosecution of the wife by the husband for adultery. In fact the contemplation of the law evidently is that the wife who is involved in an illicit relationship with another man is a victim and not the author of the crime. See Sowmithri Vinu's case reported in 1985 Criminal Law Journal p. 1302. In the present case, the facts suggest that there are all the bonafide



on the part of the respondent no. 1 - wife in getting married with the respondent no. 2. Thus, it is not the matrimonial offence, but it is a matrimonial error of which she clearly has become victim. In the absence of any contrary intention in the statute, the words "guilty of adultery" have to be broadly canvassed as aforesaid. It may be noted that law is to be administered according to principles of justice, equity and good conscience and construction of the words 'guilty of adultery' as aforesaid will appropriately be in consonance with the concept of justice, equity and good conscience. After all it is good conscience that is the gist of all religious and for that matter a pivotal force in the administration of justice.

In *Reynold Rajamani v. Union of India* reported in AIR 1982 S.C. 1261 Chinnappa Reddy, J., concurring with the view that when section 10 of the Indian Divorce Act specifically sets forth the grounds on which a marriage may be dissolved, additional grounds cannot be included by the judicial construction of some other section or some other provision of the statute other than the Indian Divorce Act, has observed in para. 14 as under :-

"Divorce by mutual consent should be available to every married couple, whatever religion they may profess, and however, they were married. Let no law compel the union of man and woman who have agreed on separation. But our society still looks askance at a divorced woman. She needs protection. So, the law which grants the decree for divorce must secure for her some measure of economic independence. It should be so whatever be the ground for divorce, whether it is a mutual consent irretrievable break down of the marriage, or even the fault of the woman herself. Afterall, Indian society today is so constituted that a woman is generally helpless and her position becomes worse if she is divorced. It is necessary that the law should protect her interests even if she be an erring spouse, lest she become destitute and a dead loss to society."

The Apex Court has in para. 4 of the citation said that when a legislative provision specifies the grounds on which divorce may be granted they constitute the only conditions on which the Court has jurisdiction to grant divorce. If grounds need to be added to those already specifically set forth in the legislation, that is the

business of the Legislature and not of the Courts. It has however observed that in construing the language in which the grounds are incorporated the Courts should give a liberal construction to it. Construing the words "guilty of adultery" accordingly it would make available the ground as set forth in section 10 of the Indian Divorce Act.

14. Hence, in the facts and circumstances of the case as supported by the evidence noticed hereinabove, issue nos. I and II shall have to be answered in the affirmative and issue no. III part-I shall have to be answered in the affirmative and part-II as under :

Respondent no. 1 is guilty of adultery only in the sense indicated.

15. In this view of the matter and bearing in mind peculiar facts and circumstances of the case, following order is required to be passed while answering the issues as aforesaid :-

The petitioner's marriage with respondent no. 1 solemnized on 4/11/1995 is ordered to be dissolved by a decree of dissolution of marriage to be a decree nisi for a period of six months from today. The petitioner is directed to move the Court for passing order for decree absolute immediately upon the expiry of period of six months from today.

There shall be no order as to cost.

A copy of this judgment shall be sent to the State Bar Council for taking appropriate steps or action into the matter in respect of the consent divorce deed which the petitioner and respondent no. 1 were advised to enter into.

PVR. \* \* \*